

# INFORMATION

F O R

**RICCARDTON DRUMMOND**

*Against*

*The Creditors of Sir William Nicol-  
son of that Ilk.*

**R**iccardton Drummond, having engaged himself as Co-principal, with the deceast Sir William Nicolson in two Bonds, one of 6000 merks principal, to the deceast Mr. Edward Wright; And an other of 4000 merks principal, to the deceast Sir John Young of Lenie, without any Clause or Bond of Relief, albeit the Money was wholly converted to Sir William's use, and that in effect Riccardton was only bound as Surety and Cautioner for him, tho the saids Creditors choosed rather to have him bound in the Bonds as Coprincipal: Riccardton, in Sir William's own time, intended an Action of Declarator, that the Terms of his foresaid Engagement might be declared, and Sir William decerned to relieve or secure him for his Relief, as being upon the matter, a meer Cautioner for him.

This Declarator not having taken effect in Sir William's life, and the Estate of Nicolson being now sold by Roup, and the Price lying consigned, until some Questions amongst the Creditors be discusst, One of these Questions is anent Riccardton's foresaid Declarator, who craves to be received in the Competition as a Creditor, in manner foresaid, and Riccardton having by the Lords deliverance upon a Bill, obtained in February 1687, certain Witnesses to be examined upon the foresaid Points of his Declarator, that their Depositions might ly *in retentis*, until the advising of the Cause, and the said Depositions being taken, and now craved to be advised, after the reading of these Depositions *in præsentia*, which clearly prove, That albeit Riccardton was insert as Co-principal in the Bonds foresaid, yet he was only a Cautioner for Sir William, and that the Money was ap-  
plied



plied to Sir William's proper use, and that Sir William caused draw a Bond of Relief to Riccardton thereanent, which was only not accepted of by Riccardton, for the Reason contained in the Depositions.

It was Objected by the Creditors. 1. That Riccardton his being Co-principal in the Bonds, without any Clause or Bond of Relief, did naturally infer, That he had received the half of the Money, or at least that the half thereof was borrowed for his behoof, which being established by Writing, could not be taken away to the prejudice of Sir William and his Creditors, except *scripto vel juramento partis*, but not at all by Witnesses. To which it is answered for Riccardton, That albeit Persons, binding as Co-principals, in manner foresaid, may of itself import, that the Money was borrowed equally for their behoof, Yet, this Presumption is of very little weight or moment, In regard, that it is very well known, that the general custom of such Bonds, doth run quite contrare, it being most certain, that the several Persons may be bound in one Bond, as Co-principals, yet it is still presumed, that the Money is borrowed for the behoove of one of them in particular, & that the Bond is only taken from them all as Co-principals; Because such was the Creditors choise, who commonly judge the Obligation to be stronger upon all, when they are bound as Co-principals, then when one is only bound as principal, and the rest as Cautioners; And this is so certain, first, That it can hardly be instanced, that ever upon the binding of Co-principals the Money was truly to the behoof of all, except in the case only where they were previous partners, and known to be such, which neither is nor can be alledged in this case, betwixt Riccardton & the said Sir William. And 2. That we see daily, that Creditors *ad majorem cautelam* will have such who interpose only as Cautioners to bind as Co-principals, and very often do refuse to allow any clause of Relief to be insert in the Bond, but leave it to the Obligants to order this by a Bond of Relief apart, so that in effect, wherever a Bond appears to be granted by Two or more as Co-principals, the presumption more naturally rises, that one of them is only principal and the rest sureties, then that the Money was borrowed to all their behooves, unless this presumption be taken off by alledging, and proving, that these Co-principals were previous partners in a common Society, which cannot be alledged in this case.

Not can it be Replied for the Creditors, That it in the case of more Co-principals there be ordinarily a clause or Bond of Relief, then in this case where there is neither, the presumption must return upon Riccardton, because it is evident that the Creditors having refused to suffer clauses of Relief to be insert in the Bonds, it was only Sir William's fault, that Bonds of Relief apart were not granted, and the pursuit raised by Riccardton against Sir William in his own time for this Relief, and the Treaty proven to have been about it, do prove this point above Exception, (eing therefore that it is no ways established by writren Bonds, that the Money borrowed was to the equal behoof of the Co-principals, but that the presumption runs far stronger that it was not, it is without controversie, that this point in question is not to take away Write by Witnesses, but only to clear the import of the Writing by Witnesses, which are certainly thereto most proper and probative: So that Sir William's Creditors cannot in reason alledge, that Riccardton, doth in this case offer to take away Write by Witnesses, since all contended for, is to clear a point which remains doubtful by the Write. and presumes much stronger for Riccardton by Witnesses above exception which all Law allows.

But

will not be -



( 3 )

But 2. It was alleadged for the Creditors, That as it was against Law to allow Witnesses to take away Write, so the Depositions were not all of Instrumentary Witnesses, but most of the Witnesses were extraneous. To which it is answered, That scarce in any case, can more proper Witnesses be adduced, nor in the case in hand, they being partly the Writer and Witnesses of the Bonds, and partly Lawyers and Agents concerned for both Parties in the Treaty that was betwixt Sir William himself and Riccardton, for this Relief. And 2. The Depositions are so Circumstantial, and strongly Adminiculated, both by the Copie of the Bond of Relief, that was drawn, and almost concluded, and which deserted only upon a groundless Scruple on Sir William's part, and likewise by the process raised by Riccardton, in Sir William's life, that there cannot be a clearer Evidence desired in any matter of this kind.

And whereas it was alleadged for the Creditors, that Witnesses could in Law, neither be allowed to prove contrare to Writ, Nor 2. To prove verbal Promises, or naked Emission of Words: It is Answered, That albeit in Law direct payment of a Debt constitute by Write, cannot be proven by Witnesses, yet it also uncontrovertible, that payment of a Debt may be proven consequentially by positive probation of a Deed which does presume the same, and which Deed is probable, either by pregnant presumptions, or Witnesses beyond exception; As for instance, The payment of an Bond cannot be proven by Witnesses, yet a positive Fact may be proven which will necessarily infer the same; As if it should be proven, that the Bond was returned *apud debitorem*, it would evacuate the same as well as an Discharge bearing payment.

To the Second, It is Answered, That Witnesses are not in this case adduced for taking away a Write directly, but only for clearing the Import thereof as said is, which is both consonant to Law and Custom, and this is not the case of proving naked words by Witnesses, because here there is Write and a Tract of Business, viz. the Borrowing of Money, and the communing betwixt the parties anent the relief, and their Advocats and Writers, anent the drawing of an Bond of Relief as said is, so that there is not only an Tract of Affairs, but also *rei interventus*, and it is unquestionable in Law, but that Words or Communings accessory to Bargaines or Treaties, are probable by Witnesses, so far more in this case, when the Witnesses are Gentlemen of Knowledge, Advocats and Writers, all beyond exception as said is.

In Respect whereof, The Probation ought to be sustained by Witnesses, whereby it is sufficiently proven that Riccardton was only Cautioner in the saids Two Bonds, and that the Money was applied solely for Nicolson's behoof. v

NO.	31730	R
CLASS	9 XK	
DATE		
VALUE		R/-
REMARKS: <i>See file.</i>		











judicial Sale p. 45.  
In a last case Child  
on their Chancery with pa  
creditor.

The Effect of a rev. judicial p. 122.

Compensation in former

Death of the predecessor, how paid in a  
last service.



